IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN, JAIPUR BENCH, JAIPUR.

D. B. CRIMINAL APPEAL NO.334/2003
(Kalu @ Shafiq Vs. Sate of Rajasthan)

Date of Judgment: September 26, 2007.

Hon'ble Mr. Justice Shiv Kumar Sharma
Hon'ble Mr. Justice R. S. Chauhan

Mr. Prithviraj Singh Rajawat for the Appellant.
Mr. B.N. Sandu, PP for the State.

(Per Court):( Hon'ble R.S. Chauhan J.)

Reportable

The alleged murder of Abdul Mukim, the conviction vide judgment dated 1.2.03, has brought the appellant, Kalu @ Shafiq, before this court. Vide the impugned judgment, the appellant was convicted for offences under Section 302 and was sentenced to life imprisonment and imposed with a fine of Rs. 1,000/- and to further undergo two months of simple imprisonment in default thereof. However, the appellant was acquitted of offences under Sections 147, 148, 120-B of IPC by the learned trial court.

The brief facts of the case are that on 9.8.98, one Kallu Khan (P.W.1), gave a report to the A.S.I., Police Station,

Aklera wherein he claimed that “his son, Abdul Mukim and his daughter, Mobina Bai, had left for Khanpur yesterday in order to get the teeth of Mobina Bai fixed. Today, at around 4 O' Clock in the evening, my daughter Mobina Bai came running to the house and she told him that today when both the brother and the sister were returning back home after boarding the bus, while the bus was crossing Arania  Ke Mali Ki Dhani, Kalu S/o Sultan and Sultan S/o Chhote Khan, both climbed into the bus. Immediately after climbing into the bus, Kalu struck Abdul Mukim near his right eye with a knife and also struck him on the right side of his neck. When the bus stopped, Usman, Bhuriya and the younger son of Sultan were hiding in the bushes while carrying a gun, lathies (Bamboo Sticks). She further claimed that she escaped from the scene of the crime and rushed back home. Upon her information, the complainant claimed that he immediately left for the Aklera Hospital where he discovered that his son had died.” On the basis of this report the police chalked out a formal FIR. After a thorough investigation, the police submitted the charge-sheet against five persons namely, Kalu @ Shafiq, the appellant before this court, Sultan Khan,

Usman, Rais and Bhuriya for offences under Sections 147, 148, 120-B, 302 read with Section 34 and in the alternative under Section 302 read with Section 149 IPC. In order to prove its case the prosecution examined twenty-two witnesses and submitted nineteen documents. Although the accused persons did not examine any witness, they did submit five documents in defence. After going through the oral and documentary evidence while the appellant has been convicted and sentenced as aforementioned, the other four co-accused persons, namely Usman, Rais, Sultan and Bhuriya have been acquitted by the learned trial court. Hence, this appeal before this court.

Mr. P.R.S. Rajawat, the learned counsel for the appellant, has argued that the star witnesses of the prosecution are Mobina Bai (P.W.2) and Shabbir Ahmed (P.W.3) However, Mobina Bai, is not only an interested witness, but is also an unreliable one. Secondly, there are glaring contradictions between the testimony of Mobina Bai and Shabbir Ahmed, although both of them claimed to be the eye-witnesses of the alleged incident. Thirdly, the testimony of Mobina Bai is not

corroborated by the medical evidence. Fourthly, even if the prosecution case is taken to be true, then it is a case of a sudden fight without any premeditation. Moreover, only a single injury has been inflicted by the accused. Therefore, the case does not travel further than Section 304 Part II IPC. The appellant has already spent over six years of incarceration. Therefore, his conviction should be reduced from offence under Section 302 to one under Section 304 Part II IPC.

On the other hand, Mr. B.N. Sandu, the learned Public Prosecution for the State, has argued firstly, that Mobina Bai (P.W.2) is a natural witness as according to Kallu Khan (P.W.1) she had gone with her brother Abdul Mukim in order to get her teeth fixed by the dentist. Therefore, her presence in the bus was natural. Secondly, her testimony is corroborated by the medical evidence. Thirdly, that Shabbir Ahmed (P.W.3) is an independent witness, who has supported the case of the prosecution. Fourthly, that the case squarely falls within the ambit and scope of Section 302 IPC. Therefore, he has supported the impugned judgment.

We have heard the learned counsels for the parties, have perused the impugned judgment and have examined the record.

Mobina Bai (P.W.2) claims that her brother and she had gone to Khanpur on 9th of August in order to get her teeth fixed. Around 12 O' Clock in the afternoon they went to the Bus Stand in order to return to their village. They boarded the Milan Bus. Since the bus was jam-packed, therefore, while her brother sat in the front portion of the bus, she sat in the back of the bus. When she boarded the bus, she did not see Kalu and Sultan in the bus. When the bus stopped between Arnia and Poli, the accused persons boarded the bus. She further tells us, “While Sultan Khan caught hold of my brother, Kalu struck my brother with knife. When I got up from the back of the bus, I saw Sultan and my brother wrestling with each. Kalu also struck my brother on his back with knife. They left him outside the bus. We brought him back into the bus.” She further claims that while she saw Kalu and Sultan at the scene of the crime, she did not see the other co-accused persons. Even in her cross-examination, she admits that the bus was jam-packed. She

further admits that the occurrence had occurred suddenly. She further admits that prior to this incident, no untoward incident, or quarrel had ever occurred between the appellant and the deceased. She further admits that the appellant and her brother were wrestling with each other. But, she denies the fact that her brother was carrying a knife. Even in her cross-examination she insists that the appellant struck her brother on the neck and the back.

On the other hand, Shabbir Ahmed (P.W.3), claims that Mobina was not sitting in the back of the bus, but was sitting somewhere in the middle of the bus. In his cross-examination he admits that the bus was full of people who were also standing in the gallery. He also admits in his cross-examination that because of the over-crowding in the bus, he did not see the appellant striking the deceased with the knife. He further alleges that the appellant had struck the deceased below the waist with a knife. He also claims in his cross-examination that the appellant was travelling in the same bus and did not board the bus. Lastly, according to him Sultan Khan was standing outside the bus when the incident occurred.

Clearly there are minor contradictions between the testimony of these two eye-witnesses. However, the Post-Mortem Report (Ex.P.11) clearly shows that the deceased had sustained two incised wounds, one near the left eye and the other on the neck. Therefore, the Post-Mortem Report does not corroborate the statement of the two witnesses. According to Mobina Bai the deceased was struck on the back. Yet there is no incised wound on the back of the deceased. Likewise, according to Shabbir Ahmed (P.W.3) the deceased was struck below his waist with a knife, but there is no injury below the waist of the deceased.

According to both the witnesses, the fight was sudden, without any premeditation. According to the Post-Mortem Report (Ex. P.11), the deceased had suffered only a single knife blow on the neck. Therefore, the intention to cause the death of the deceased is not clearly made out. But simultaneously, the knowledge that such a cut is likely to cause death can certainly be imputed.

For these reasons, we partly allow the appeal of appellant Kalu @ Shafiq and instead of section 302 we convict him under section 304 part II IPC. Looking to the fact that the appellant has already undergone confinement for a period more than six years and one month, the ends of justice would be met in sentencing him to the period already undergone by him in confinement. The appellant Kalu @ Shafiq, who is in jail, shall be set at liberty forthwith, if he is not required to be detained in any other case.

The impugned judgment of the learned trial court stands modified as indicated above.

( R.S. CHAUHAN ) J. ( SHIV KUMAR SHARMA ) J.

MRG.